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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

JACK HINSON, Petitioner

V.

THE STATE OF ALABAMA, Respondent

PETITION FOR A WRIT OF CERTIORARI

To the Alabama Court of Criminal Appeals

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September 20, 1982

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QUESTIONS PRESENTED FOR REVIEW

I

Whether defendant's right to due process under the Fourteenth Amendment was denied when the Alabama trial court denied defendant's motion to exclude the State's evidence, where the State failed to offer any evidence on the mens rea or guilty scienter.

II

Whether on appeal as a matter of right, defendant was denied due process and equal protection under the Fourteenth Amendment when the Alabama Court of Criminal Appeals failed to write an opinion supporting its decisions, considering the exigencies of Rule 39(c)(4), Alabama Rules of Appellate Procedure, which requires an opinion as condition prerequisite to review by the Supreme Court of Alabama.

INDEX

	Page
Opinions Below	1
Statement of Jurisdictional Grounds	2
Questions Presented for Review	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
How Questions Raised in State Courts	4
Reasons for Allowance of the Writ	5
I. State Failed to Introduce Evidence of Mens Rea	5
II. Alabama Appellate Court Failed to Write Opinion	9
Conclusion	11
Prayer	12
Proof of Service	13

INDEX TO APPENDIX

Number		Page
A	Defendant's Motion to Exclude	1a
B	Judgment Entry	2a
C	Jury Trial (Guilty)	2a, 3a
D	Motion for New Trial	4a
E	Order on Motion for New Trial	5a

INDEX TO APPENDIX (Continued)

Number		Page
F-1	Order of Alabama Court of Criminal Appeals Affirming Trial Court Without Opinion	5a
F-2	Notice of Affirmance Without Opinion By Alabama Court of Criminal Appeals	6a
G-1	Order Denying Application for Rehearing	6a
G-2	Notice of Order Denying Rehearing	7a
H-1	Order of Alabama Supreme Court Denying Petition for Writ of Certiorari	7a
H-2	Notice of Alabama Supreme Court Order	8a
I	Order of Alabama Supreme Court Denying Rehearing	8a

TABLE OF AUTHORITIES

CASES:	Page
Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974)	10
Dorrough v. Estelle, 497 F. 2d 1007 (5th Cir. 1974), reversed on other grounds, 420 U.S. 534, 95 S. Ct. 1173, 43 L. Ed. 2d 377 (1975), rehearing denied 421 U.S. 921, 95 S. Ct. 1589, 43 L. Ed. 2d 790 (1975)	10
Douglas v. People of State of California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963)	11
Doyle v. United States, 366 F. 2d 394 (9th Cir. 1966)	11
Frank v. Mangum, 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969 (1915)	10
Garner v. Louisiana, 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961)	7,8

TABLE OF AUTHORITIES (Continued)

CASES:	Page
Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956), rehearing denied 351 U.S. 958, 76 S. Ct. 844, 100 L. Ed. 1480 (1956)	10, 11
Hawkins v. State, 247 Ala. 576, 25 So. 2d 441 (1946)	6, 9
Javits v. Stevens, 382 F. Supp. 131 (D.C.N.Y. 1974)	10
Kinsella v. United States, 361 U.S. 234, 80 S. Ct. 297, 4 L. Ed. 2d 268 (1960)	9
Player v. Steiner, 292 F. 2d 1 (4th Cir. 1961), cert. denied 368 U.S. 959, 82 S. Ct. 404, 7 L. Ed. 2d 390 (1961)	7
Rinaldi v. Yeager, 384 U.S. 305, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966)	10
Shuttlesworth v. Birmingham, 382 U.S. 87, 86 S. Ct. 211, 15 L. Ed. 2d 176 (1965)	7, 8
Smith v. State, 45 Ala. App. 63, 223 So. 2d 605 (1969), cert. denied 284 Ala. 734, 223 So. 2d 610 (1969)	4
Taylor v. Louisiana, 370 U.S. 154, 82 S. Ct. 1188, 8 L. Ed. 2d 395 (1962), rehearing denied, 370 U.S. 965, 82 S. Ct. 1578, 8 L. Ed. 2d 834 (1962)	8
Thompson v. Louisville, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 624 (1960)	6, 7, 8
United States ex rel De Moss v. Pennsylvania, 316 F. 2d 841 (3rd Cir. 1963), cert. denied, 375 U.S. 859, 84 S. Ct. 123, 11 L. Ed. 2d 85 (1963)	7

CONSTITUTIONAL PROVISIONS:

Constitution of the United States:

	Page
Amendment XIV	2,4,5, 6,9, 10,11, 12

STATUTES:	Page
Ala. Code § 13A-4-2 (1975)	2, 2, 5, 8
Ala. Code § 13A-7-6 (1975)	3, 5
Ala. R. App. P. 39(c)(4) (1975)	2,3,4, 9,11, 12

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Jack Hinson, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Alabama Court of Criminal Appeals entered in the case of **Jack Hinson v. State**, Case No. 963, Div. 4, 1982, entered on April 20, 1982, affirming Judgment of Conviction entered by the Circuit Court of Dale County, Alabama, in the case of **State of Alabama v. Jack Hinson**, by which petitioner was sentenced to six years in the penitentiary for attempted burglary in the second degree. He timely prosecuted his appeal as a matter of right.

Application was made to the Alabama Court of Criminal Appeals for rehearing, which application was denied on May 18, 1982, without opinion. Timely petition to the Supreme Court of Alabama for Writ of Certiorari was then made. This petition was denied on July 2, 1982, without opinion. On July 26, 1982, the Supreme Court of Alabama denied petitioner's request for rehearing.

Petitioner then applied to the Alabama Court of Criminal Appeals for a stay of execution to allow petitioner to file this petition for writ of certiorari before this Honorable Court. The stay was granted.

The petition is, therefore, timely filed, being within ninety days after entry of judgment of a State Court of last resort, in compliance with Supreme Court Rule 22-1.

OPINIONS BELOW

The judgment of the trial court was entered on June 1, 1981. The trial court's order denying defendant's motion for new trial was entered on October 7, 1981 and is attached as Appendix E.

The decision of the Alabama Court of Criminal Appeals on April 20, 1982, was not accompanied by an opinion and is not reported. Its order and notice are attached as Appendix F-1 and F-2. The Alabama Court of Criminal Appeals overruled defendant's application for rehearing on May 18, 1982. The order and notice are attached as Appendix G-1 and G-2.

The Supreme Court of Alabama denied defendant's petition for

writ of certiorari on July 2, 1982, without opinion. Order and notice are attached as Appendix H-1 and H-2. Defendant's application for the Supreme Court of Alabama for rehearing was denied on July 26, 1982. The Court's order is attached as Appendix I.

STATEMENT OF JURISDICTIONAL GROUNDS

Jurisdiction to review the judgment or decisions in question by Writ of Certiorari is conferred upon this Honorable Court by the Constitution of the United States, and particularly Amendment XIV, Section 1.

QUESTIONS PRESENTED FOR REVIEW

I

Whether defendant's right to due process under the Fourteenth Amendment was denied when the Alabama trial court denied defendant's motion to exclude the State's evidence, where the State failed to offer any evidence on the mens rea or guilty scienter.

II

Whether on appeal as a matter of right, defendant was denied due process and equal protection under the Fourteenth Amendment when the Alabama Court of Criminal Appeals failed to write an opinion supporting its decisions, considering the exigencies of Rule 39(c)(4), Alabama Rules of Appellate Procedure, which requires an opinion as condition prerequisite to review by the Supreme Court of Alabama.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I

Constitution of the United States, Amendment XIV:

"No state shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II

Ala. Code, Sec. 13A-4-2(a) (1975)

"(a) A person is guilty of an attempt to commit a crime if, with the intent to commit a specific offense, he does any overt act

towards the commission of such offense."

III

Ala. Code, Sec. 13A-7-6(b) (1975)

"(b) In the alternative to subsection (a) of this section, a person commits the crime of burglary in the second degree if he unlawfully enters a lawfully occupied dwelling-house with intent to commit a theft or felony therein."

IV

Ala. R. App. P. 39(c)(4) (1975)

"...petitions for writs of certiorari will be considered only:

(4) From decisions in conflict with prior decisions of the Supreme Court or the courts of appeals; provided that when (4) is the basis of the petition, it must quote that part of the opinion of the appropriate court of appeals, and that part of the prior decision of the Supreme Court with which the conflict is alleged; or if the conflict is with a prior decision of the court of appeals, the conflicting passages must be quoted; or it shall state specifically and with particularity wherein such decision is in conflict;..."

STATEMENT OF THE CASE

Petitioner Jack Hinson (hereinafter usually referred to as "Defendant") was charged by indictment reading as follows:

"The Grand Jury of said County charge that before the finding of this indictment that Jack Hinson did, unlawfully attempt to enter the lawfully occupied dwelling house and business place of E.C. Clouse, Jr., with the intent to commit a theft or felony therein, to-wit: theft of property, in violation of Title 13A-7-6(b) of the Code of Alabama, against the peace and dignity of the State of Alabama."

Direct evidence supporting the indictment was testimony that a person identified by E.C. Clouse, Jr. as Defendant shook the door of his combination dwelling house and business place at approximately 4:00 a.m. on March 29, 1981 (TR 6). The man had nothing in his hands to open the door with (TR 7, 8) and after he shook the door he "walked down the steps and right underneath the spotlight" (TR 7, 8).

Clouse had his place of business, including a showroom, bookkeeper's office, his private office, his private bedroom and two

baths on the second level of the building which is reached by a flight of stairs going to the back door in question. Beneath is nothing but storage space (TR 11).

The person at the door did nothing but shake it and the noise caused Clouse to wake up. He heard the door being shaken several times but it was not damaged at all (TR 14).

There was absolutely no proof of a breaking. There was absolutely no proof of an entering. There was absolutely no proof of a theft, or attempted theft.

There was absolutely no proof from which the jury could lawfully find that the person who roused Mr. Clouse was attempting to do anything other than wake him for business or social reasons. Clouse did not answer the door and the person left peacefully without doing any damage or committing any act from which the jury could have found beyond a reasonable doubt the intent to commit a theft as averred in the indictment (TR 6-47).

The trial judge overruled the motion to exclude (TR 48, 49), and refused the general charge of acquittal for defendant (TR 105).

The Alabama Court of Criminal Appeals affirmed the trial court without an opinion. Defendant contends that this affirmation of the action of the trial court in overruling the motion to exclude the evidence effectively denies defendant due process of law, equal protection of the law, and has impaired Defendant's right to review by the Supreme Court of Alabama under Rule 39(c)(4) of the Alabama Rules of Appellate Procedure.

The Supreme Court of Alabama denied petition for writ of certiorari on July 2, 1982, without opinion and appellant contends that by so doing, the Alabama Supreme Court has joined the lower state courts in depriving appellant of rights guaranteed him by the Constitution of the United States.

HOW QUESTIONS RAISED IN STATE COURTS

Question I was raised in the trial court by defense counsel's motion to exclude made at the conclusion of the State's presentation of evidence (TR 48). This is a proper method of testing the sufficiency of the evidence in Alabama and amounts to requesting a directed verdict of acquittal. **Smith v. State**, 45 Ala. App. 63, 223 So. 2d 605 (1969), *cert. denied*, 284 Ala. 734, 223 So. 2d 610 (1969).

Question I was also raised in defense counsel's motion for new trial, whereby Defendant contended that the verdict of the jury was contrary to both the law and evidence in the case. Both the motion to exclude and the motion for new trial were denied by the trial court. The question was also raised before the Alabama Court of Criminal Appeals and the Alabama Supreme Court in defendant's supporting briefs. The Court of Criminal Appeals affirmed without opinion the trial court's decision and denied rehearing, and the Alabama Supreme Court denied both the petition for a writ of certiorari and the application for rehearing.

Question II was raised for the first time in Defendant's brief supporting his application for rehearing by the Alabama Court of Criminal Appeals. The question was also presented to the Alabama Supreme Court in Defendant's petition for writ of certiorari and in his application for rehearing.

REASONS FOR ALLOWANCE OF THE WRIT

I

Defendant has been deprived of substantial constitutional rights by his conviction in Dale County's Circuit Court of the crime of attempted burglary in the second degree. Said conviction, and subsequent affirmance of the conviction by Alabama appellate courts, denies Defendant his rights to due process of law as guaranteed by the Constitution of the United States, Amendment XIV, Sec. 1.

The Dale County Grand Jury indictment specifically charged Defendant with attempting to commit the crime of burglary in the second degree in violation of Sec. 13A-7-6(b) of the Alabama Criminal Code. Under Sec. 13A-7-6(b), a person commits the crime of burglary in the second degree "if he unlawfully enters a lawfully occupied dwelling house with intent to commit a theft or felony therein." The face of Sec. 13A-7-6(b) clearly indicates that intent to commit a theft or felony inside the dwelling house is a material element of the crime. This intent is therefore a material element of the crime of attempted burglary in the second degree. Under Sec. 13A-4-2 of the Alabama Criminal Code, a person commits an attempt when, "with the intent to commit a specific offense, he does any overt act towards the commission of the offense."

The burden of proving this material element of intent was not

met by the State, nor did the State make any effort to meet this burden. The State offered evidence only to show that Defendant walked to the door of the complainant, shook the door, walked away, and was apprehended by the police (TR 6-9). The State completely failed to produce even a glimmer, spark, or scintilla of evidence that defendant had the requisite intent to commit a theft or felony inside the dwelling house.

Under Alabama law, a defendant cannot declare his intent. The criminal intent must be inferred by the jury from a due consideration of all the material evidence in the case. **Hawkins v. State**, 247 Ala. 576, 25 So. 2d 441 (1946). The State therefore has the burden of introducing evidence which will justify an inference of intent. The State completely failed to introduce any evidence or establish any unlawful act which could possibly give rise to an inference of Defendant's intent to commit a felony or theft inside the dwelling house. The dwelling house of the complainant Mr. Clouse was also his place of business and hence a public place. There was no evidence offered by the State to show that Mr. Clouse did not receive callers or was not open to do business at the time of the incident. The fact that Defendant shook the door of a place of business at a certain time, without proof as to the business hours or customs of the business, proves nothing but an aggravation. The proof of a mere aggravation, and nothing more, falls severely short of proving an act which gives rise to an inference of the required intent. The State failed to show that Defendant was committing any unlawful act while on the complainant's premises; the State even failed to show that Defendant was committing a criminal trespass. The State's complete failure to present evidence from which a jury could infer intent was timely and properly raised by defense counsel's motion to exclude at the conclusion of the State's presentation of evidence. The motion was denied by the trial court.

The trial court's denial of defense counsel's motion to exclude was a violation of Defendant's right to due process under the law. As this Court held in **Thompson v. Louisville**, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 624 (1960), to punish and convict a defendant without evidence of his guilt would be no less violative of due process requirements than the conviction of a defendant without charging him with the crime. Under **Thompson** standards, a conviction will not stand when the record is "so totally devoid of evidentiary support as to render his conviction unconstitutional under the due process clause of the Fourteenth Amendment." 362 U.S. at 199. The question presented in **Thompson**, like the question presented in the present case, turns not on the sufficiency of the

evidence but rather on whether there exists any evidence at all.

The **Thompson** facts involved a situation where the State utterly failed to produce evidence on any element of the offense charged. The question left standing was whether the **Thompson** holding may be applied where the State fails to produce evidence on only some of the elements of the crime. This question is especially important here since the State arguably proved one element of attempt, the overt act, but failed to prove another element, defendant's criminal intent. In **Shuttlesworth v. Birmingham**, 382 U.S. 87, 86 S. Ct. 211, 15 L. Ed. 2d 176 (1965), defendant was convicted of violating an ordinance which apparently had three elements: An officer must have been directing vehicular traffic, he must have given an order, and the person so ordered must have failed to obey. Defendant had been standing on a sidewalk with a group of other people, and refused to move after being told to do so by a police officer. Two of the elements were established by the State, but there was no evidence which showed that the officer was directing vehicular traffic at the time he gave the order. The Court in **Shuttlesworth** relied on **Thompson** and reversed the conviction on the ground that the ordinance might have been applied unconstitutionally.

One year after the **Thompson** decision, a federal Court of Appeals held that a conviction without proof of one of the elements of a crime was not the same as a conviction on absolutely no evidence at all. **Player v. Steiner**, 292, F. 2d 1 (4th Cir. 1961), *cert. denied*, 368 U.S. 959, 82 S. Ct. 404, 7 L. Ed. 2d 390 (1961). According to **Player**, to challenge a conviction on the ground that the State introduced no evidence on only one element of the crime would be essentially to challenge the **sufficiency** of the evidence, thereby insulating the case from **Thompson** demands. However, this view was later rejected in **United States ex rel. De Moss v. Pennsylvania**, 316 F. 2d 841 (3rd Cir. 1963), *cert. denied*, 375 U.S. 859, 84 S. Ct. 123, 11 L. Ed. 2d 85 (1963). The Court, in footnote 4 of its opinion, pointed out that **Player** "appears contrary to the sense and analysis" of **Garner v. Louisiana**, 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961). **Garner**, a case based on and decided in the wake of **Thompson** in 1961, had involved a situation where, like **Thompson**, there was no evidence of **any** element of the crime charged. In other words, **De Moss** also stands for the **Shuttlesworth** proposition that a conviction without proof of one of the

elements of a crime is no different, at least as regards due process considerations, than a conviction on absolutely no evidence at all.

There exists still more authority to support the contention that the failure to produce evidence on only one element of the crime constitutes a denial of due process. In **Taylor V. Louisiana**, 370 U.S. 154, 82 S. Ct. 1188, 8 L. Ed. 2d 395 (1962), *rehearing denied*, 370 U.S. 965, 82 S. Ct. 1578, 8 L. Ed. 2d 834 (1962), the Court, citing **Garner**, reversed the defendants' convictions after stating that the only evidence to support the convictions was that defendants violated a custom that segregated people in waiting rooms according to their race. Since **Taylor** was relying on **Garner** (and hence **Thompson**), **Taylor** apparently held that the trial record was "totally devoid of evidentiary support" (the language used in **Garner** and **Thompson**). Since there was unquestionably some evidence of the elements of the crime under which the convictions were had, the **Taylor** holding apparently stands for the proposition, subsequently set forth in **Shuttlesworth**, that the failure to produce evidence on only one element is a denial of due process.

The statute denouncing the crime in this case specifically required mens rea. The offense does not fall within the group of "strict" liability crimes, for which criminal liability is imposed in the absence of any mens rea. The indictment alleged and the State had the burden of showing that defendant shook the door in question with intent to steal. There is absolutely no proof of that intent. It is, therefore, a denial of due process to submit the question of guilty vel non to the speculation of the jury.

Even if one assumes that the shaking of the door of a dwelling house was sufficiently unlawful to give rise to an inference of intent, this "inferred intent" view should be rejected in cases where only an attempt to commit a crime was charged. As pointed out, *supra*, an attempt in Alabama occurs when one "with the intent to commit a specific offense...does any overt act towards the commission of such an offense." Ala. Code Sec. 13A-4-2 (1975). If intent is to be inferred in such cases of attempt, the result will be that **any** act which is arguably an overt act towards the commission of an offense will give rise to an inference of intent. Thus, no matter how minor or remote an act from the actual offense, the mere occurrence of an act will weigh heavily towards establishing the necessary intent and proving the complete crime of attempt. To allow the State of

Alabama to loosely infer defendant's criminal intent in attempt cases is in itself a denial of due process. It has been said, due process has to do with the denial of "fundamental fairness shocking to the universal sense of justice..." **Kinsella v. United States**, 361 U.S. 234 at 246, 80 S. Ct. 297, 4 L. Ed. 2d 268 (1960). The conviction of Defendant in this case amply illustrates the harsh effects of Alabama's inferred intent doctrine in attempt cases. In effect, Defendant was sentenced to six years in the state penitentiary merely for shaking a door.

II

The affirmance of the trial court's decisions without opinion by the Alabama Court of Criminal Appeals denied defendant his right to due process and equal protection guaranteed by the Fourteenth Amendment to the United States Constitution.

Under Rule 39(c)(4) of the Alabama Rules of Appellate Procedure, when one petitions to the Alabama Supreme Court for review of a decision which is in conflict with a prior Alabama Supreme Court or Alabama appellate court decision, he must quote from the appellate court's opinion which is alleged to be in conflict with prior decisions. Here, petitioner had appealed of right to the Alabama Court of Criminal Appeals. The Court of Criminal Appeals issued a decision, without a written opinion, which affirmed the trial court's conviction of defendant, even though there was absolutely no proof of defendant's criminal intent. By affirming the conviction of defendant where no evidence was offered at trial by the State concerning the intent element of the offense, the Court of Criminal Appeals had thereby issued a decision which conflicted with ruling case law in Alabama that the State must provide some evidence from which a jury may reasonably infer intent. See **Hawkins v. State**, *supra*. Thus, Rule 39(c)(4) inferentially required the appellate court to write an opinion in order that Defendant might have a meaningful opportunity to invoke jurisdiction of the Alabama Supreme Court. The Alabama Court of Criminal Appeals here failed to write an opinion; defendant was notified of the appellate court's decision by postcard sent through the mail. The failure of the Court of Appeals to write an opinion has effectively denied defendant any real opportunity to appeal to the Alabama Supreme Court in violation of his Fourteenth Amendment rights.

It is well settled that the due process clause of the Fourteenth

Amendment does not require a state to provide an avenue of appellate review of state convictions. **Javits v. Stevens**, 382 F. Supp. 131 (D.C.N.Y. 1974). However, while the Fourteenth Amendment does not require that a state shall provide for appellate review in criminal cases, it is obvious that where such an appeal is provided for, the proceedings must be viewed as a part of the legal process under which defendant is held in custody by the state. These appellate proceedings are to be considered in determining whether defendant has been deprived of any Fourteenth Amendment rights. **Frank V. Mangum**, 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969 (1915). Specifically, the Fourteenth Amendment requires that when a state chooses to provide an appeal, the procedure must be in accordance with due process and equal protection constraints. **Dorrough v. Estelle**, 497 F. 2d 1007 (5th Cir. 1974), *reversed on other grounds*, 420 U.S. 534, 95 S. Ct. 1173, 43 L. Ed. 2d 377 (1975), *rehearing denied*, 421 U.S. 921, 95 S. Ct. 1589, 43 L. Ed. 2d 790 (1975). Further, these appellate procedures, should a state choose to provide them, must be kept free of unreasoned distinctions which impede open and equal access to the courts. **Blackledge v. Perry**, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); **Rinaldi v. Yeager**, 384 U.S. 305, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966).

In **Griffin v. Illinois**, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956), *rehearing denied* 351 U.S. 958, 76 S. Ct. 844, 100 L. Ed. 1480 (1956), indigent defendants asked for trial transcripts and court records which they argued were necessary to make an effective appeal from the trial court. The State of Illinois conceded that it was sometimes impossible to perfect an appeal without a stenographic transcript of the trial proceedings. The Supreme Court held that to deny the defendants a copy of the trial transcript would be to deny them any real opportunity to make an effective appeal, therefore violating their rights to due process and equal protection under the Fourteenth Amendment. While the focus of **Griffin** was on the failure to provide a transcript at the state trial level, as opposed to the failure to provide a written opinion at the state appellate level, this is not a material distinction. Said **Griffin**:

> "Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations." 351 U.S. at 18.

Doyle v. United States, 366 F. 2d 394 (9th Cir. 1966), further questions the logic of distinguishing between the necessity of having a trial transcript when appealing to an intermediate appellate court and the necessity of having a written opinion from the intermediate appellate court when the defendant wishes to appeal still further:

> "We think it is plain that an accused defendant's right to due process does not terminate with the verdict and sentence in the lower court. The decisions of the Supreme Court in Griffin v. People of State of Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891, and in Douglas v. People of State of California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811, demonstrate that the accused's constitutional rights must be protected to the extent of providing a sufficient appeal whenever under the law a judgment is appealable." 366 F. 2d at 398.

Alabama has chosen to provide a means of appellate review by Rule 39 and, having taken that step, is obligated by the Fourteenth Amendment to make her procedures comport with due process and equal protection. By arbitrarily refusing to accompany its decision with a written opinion, the Alabama Court of Criminal Appeals has pulled the rug from under Petitioner's feet, denying him any real opportunity to be heard by the Alabama Supreme Court. This roadblock thrown up by the Court of Criminal Appeals is plainly contrary to the letter and spirit of the due process and equal protection clauses of the Fourteenth Amendment.

CONCLUSION

Defendant was denied fundamental Fourteenth Amendment rights by the actions of the Alabama trial court and the Alabama Court of Criminal Appeals.

The State presented absolutely no evidence of Defendant's criminal intent. There was no evidence presented which would allow a jury to infer that Defendant had the required criminal intent to commit a theft or felony in the house he allegedly attempted to burglarize. The conviction of Defendant without proof of one of the essential elements of the offense charged denied Defendant his right to due process under the law. The submission of the case to the jury over the motion to exclude, and the subsequent approval of the trial court's actions by the Alabama appellate system, are constitutional wrongs which should not be allowed to stand without remedy.

The failure of the Court of Criminal Appeals to write an opinion further harmed Defendant's Fourteenth Amendment rights, specifically his rights to due process and equal protection. In order to perfect an appeal to the Alabama Supreme Court, Defendant was required by Rule 39(c)(4) of the Alabama Rules of Appellate Procedure to quote from or specifically refer to the portion of the lower appellate court opinion to which he took exception. Since there was no written opinion below, it was impossible for Defendant to comply with Rule 39(c)(4). Defendant was left in the awkward and constitutionally suspect position of having to guess and surmise as to what were the appellate court's grounds of decision. By forcing Defendant to wear this legal blindfold, the State has deprived Defendant of any realistic opportunity to obtain review of his conviction by the Alabama Supreme Court, in violation of his precious constitutional rights.

We respectfully pray: Let the Writ of Certiorari issue.

PRAYER

Wherefore, in consideration of the foregoing special and important reasons, the petitioner respectfully prays that Writ of Certiorari shall issue directed to the Alabama Court of Criminal Appeals and that this cause will be reviewed by this Honorable Court pursuant to the exigencies thereof.

Respectfully submitted,

George E. Trawick

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PROOF OF SERVICE

I, George E. Trawick, a member of the Bar of the United States Supreme Court, do hereby certify that I have served the foregoing Petition on Honorable Charles Graddick, Attorney General of Alabama, and attorney of record for the State in this cause by mailing same to him by United States mail, first-class postage prepaid, addressed to him at his office in the Judicial Building, Montgomery, Alabama 36100 on this the 20 day of September, 1982.

George E. Trawick

George E. Trawick
Attorney for Petitioner